Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991	)	CG Docket No. 02-278
	)	
Alliance Contract Services, *et al.* Petition for Declaratory Ruling That the FCC Has Exclusive Regulatory Jurisdiction Over Interstate Telemarketing	)	DA 05-1346
	)	
American Teleservices Association, Inc. Petition for Declaratory Ruling with Respect to Certain Provisions of the New Jersey Consumer Fraud Act and the New Jersey Administrative Code	)	DA 04-3185
	)	
Advertising Petition for Expedited Declaratory Ruling	)	DA 04-3187
	)	
Consumer Bankers Association Petition for Declaratory Ruling with Respect to Certain Provisions of the Indiana Revised Statutes and Administrative Code	)	DA 04-3835
	)	
Consumer Bankers Association Petition for Declaratory Ruling with Respect to Certain Provisions of the Wisconsin Statutes and Wisconsin Administrative Code	)	DA 04-3836
	)	
National City Mortgage Co. Petition for Expedited Declaratory Ruling with Respect to Certain Provisions of the Florida Statutes	)	DA 04-3837
	)	
TSA Stores, Inc. Petition for Declaratory Ruling with Respect to Certain Provisions of the Florida Laws and Regulations	)	DA 05-342
	)	

SPRINT NEXTEL CORPORATION REPLY COMMENTS

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Summary

Sprint Nextel make the following points in these comments:

1. The effect of the preemption order would be narrow in scope, and States would be able to continue to enforce against interstate telemarketers federal law and their own general laws prohibiting fraud and such matters. What States may not do, however, is apply their more restrictive telemarketing laws to interstate telemarketers –including when such State laws would prohibit activity that federal law expressly permits.

2. Congress's intention is unmistakably clear: States may not regulate interstate telemarketing with State telemarketing laws. This intention is evident from the text of the Telephone Consumer Protection Act, the structure of the Act, and its legislative history.

3. The additional State and consumer group arguments should be rejected. As the Supreme Court has held, "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Sprint Nextel further demonstrates that these additional arguments lack merit as well.

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SPRINT NEXTEL CORPORATION REPLY COMMENTS

Sprint Nextel Corporation submits this reply to the comments filed in this docket by certain States and consumer groups in opposition to the above-captioned declaratory ruling petitions.[1] Sprint Nextel demonstrates below that Congress clearly did not intend to permit States to apply their own telemarketing laws to interstate telemarketing, particularly when such laws would be incompatible with federal law governing interstate telemarketing. In these limited circumstances, federal preemption is statutorily required. Importantly, however, even with preemption, States will continue to play a significant role by enforcing federal law and their own general laws prohibiting fraud and such matters.

I. THE PREEMPTION ISSUE IS NARROW IN SCOPE, AND STATES AND CONSUMER GROUPS UNFAIRLY MISCHARATERIZE THE EFFECTS OF A PREEMPTION ORDER

The preemption issue in this proceeding is narrow in scope. Federal law is clear that States may:

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[1] *See* Public Notice, *Consumer & Governmental Affairs Bureau Seeks Comment on Petition for Declaratory Ruling Relating to Commission's Jurisdiction Over Interstate Telemarketing*, CC Docket No. 02-278, DA 05-1346, 20 FCC Rcd 8943 (May 13, 2005), *published in* 70 Fed. Reg. 37317 (June 29, 2005); Public Notice, *Consumer & Governmental Affairs Bureau Reopens Public Comment Period for Petitions for Declaratory Ruling Relating to Preemption of State Telemarketing Laws*, CC Docket No. 02-278, DA 04-3185, 04-3187, 04-3835, 04-3836, 03-3837, 05-342, 20 FCC Rcd 8947 (May 13, 2005), *published in* 70 Fed. Reg. 37318 (June 29, 2005).

- Regulate intrastate telemarketing and adopt more restrictive laws than federal law as applied to intrastate telemarketing;[2]
- Apply to any interstate telemarketer "any general civil or criminal statute of such State," such as general laws prohibiting fraud;[3] and
- Enforce federal telemarketing law as applied to interstate telemarketers.[4]

Instead, the issue in this proceeding is limited to whether States can also apply their telemarketing laws to interstate telemarketers – including when these State laws would *prohibit* activity that federal law *expressly* permits.

It is also important to emphasize that certain parties unfairly mischaracterize the effects of the preemption order being requested. Specifically, certain States and consumer groups claim that entry of the requested preemption orders would leave States powerless to protect their citizens from fraud, obscenity and harassment. For example, the National Association of Attorneys General ("NAAG") asserts that as a result of preemption:

- Consumers would be "unprotected against interstate telephone scams and harassment;"[5]
- There would be "no stopping . . . the fraud, harassment and other harms unscrupulous firms and individuals could inflict on consumers;"[6]
- "[O]bscene telephone calls [would no longer be] prohibit[ed];"[7]
- The FCC would have "the responsibility of preventing any and all injuries that can be suffered over the telephone, whether it be deceptive or fraudulent trade practices, unwanted telemarketing or obscenity;"[8]
- "[I]ndividuals and businesses that are dedicated to committing fraud . . . [would have] an easy escape hatch for their operations;"[9]

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2 *See* 47 U.S.C. § 227(e)(1).

3 *See id.* § 227(f)(6).

4 *See id.* § 227(f)(1).

5 NAAG Comments at 3.

6 *Id.* at 2-3.

7 *Id.* at 5.

8 *Id.* at 6.

- Interstate "scams . . . [would be put] out of the reach of the state attorney general and all other state officials;"[10]
- "Society's most vulnerable citizens, the elderly, the poor, and the mentally handicapped, will have no protection from interstate fraudsters;"[11] and
- Interstate telemarketers "will . . . chisel their victims' pensions, nest eggs, social security supplements and welfare checks."[12]

Other State and consumer group comments make similar allegations.[13]

These sweeping allegations are baseless. The Commission is not being asked to preempt "all state laws" as applied to interstate telemarketing, as States and consumer groups suggest.[14] The TCPA is very clear that States may enforce against any interstate telemarketer "any general civil or criminal statute of such State."[15] Thus, even with a preemption order, States may continue to apply to interstate telemarketers their general laws that prohibit fraud, deceptive practices, obscenity and such matters.[16] Accordingly, the States' assertion that preemption would

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9 *Id.*

10 *Id.* at 7.

11 *Id.* at 8.

12 *Id.*

13 *See, e.g.,* Indiana AG Comments at 25 ("Preemption would leave consumers exposed to interstate telephone scams."); AARP Comments at 12 ("[P]reemption . . . would leave consumers vulnerable and exposed.").

14 *See* NAAG Comments at 6; Indiana AG Comments at 2 and 5.

15 *See* 47 U.S.C. § 227(f)(6). *See also id.* § 414.

16 Of course, a State cannot contend that the very act of making an interstate telemarketing call in compliance with FCC rules is itself a deceptive practice, because general savings clauses "preserve[] only those rights that are not inconsistent with [federal law]. . . . In other words, the [Communications] act cannot be held to destroy itself." *AT&T* v. *Central Office Telephone,* 524 U.S. 214, 227-28 (1998). *See also Bastien* v. *AT&T Wireless,* 205 F.3d 983, 987 (7th Cir. 2000) ("To read [Section 414] expansively would abrogate the very federal regulation of mobile telephone providers that the act intended to create."); *Wireless Consumers Alliance,* 15 FCC Rcd 17021, 17040 ¶ 37 (2000)("Section 414 . . . cannot preserve state law causes of action or remedies that contravene express provisions of the Telecommunications Act."); *Richmond Brothers Records* v. *Sprint*, 10 FCC Rcd 13639, 13642 ¶ 15 (1995)(Section 414 does "not, however, per-

result in "[s]ociety's most vulnerable citizens, the elderly, the poor, and the mentally handicapped, will have no protection from interstate fraudsters,"[17] is without factual foundation.

The TCPA is also clear that both States and consumers may enforce against interstate telemarketers the prohibitions contained in the TCPA and the FCC's implementing rules.[18] Thus, there is also no basis to Tennessee's assertion that preemption would result in "exclusive enforcement of interstate telemarketing calls by the federal government," or to the States' claim that preemption would result in the FCC "hav[ing] the responsibility of preventing any and all injuries that can be suffered over the telephone."[19]

What States may not do, however, is apply *more restrictive* state telemarketing or do-not-call rules to interstate telemarketers. Thus, for example, if federal law permits a firm to call a customer under the "established business relationship" provision,[20] a State may not declare such calls unlawful or characterize such calls as a deceptive practice. Similarly, a State cannot require

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mit all possible state causes of action to proceed as if federal regulation of communications did not exist.").

17 NAAG Comments at 8.

18 As the National Consumer Law Center ("NCLC") observes, Congress also made clear that States may enforce the Telemarketing and Consumer Fraud and Abuse Prevention Act ("TCFAPA"). *See* NCLC Comments at 6. *See also* 15 U.S.C. § 6103 (States can enforce FTC rules). However, NCLC is wrong in stating that the TCPA is a "narrow statute" while the TCFAPA is "broader." NCLC Comments at 1-2. *See 2003 TCPA Order*, 18 FCC Rcd 14014, 14027 ¶ 15 (2003)("The FCC's jurisdiction over telemarketing practices, however, is significantly broader than the FTC's."); Government Accountability Office, *Implementation of the National Do-Not-Call Registry,* GAO Report No. 05-113, at 11-12 and Table 1 (Jan. 2005)("FCC's jurisdiction is broader than FTC's" and "FTC's jurisdiction is narrower than FCC's in that it excludes purely intrastate telemarketing campaigns and calls involving certain industries.").

19 TRA Comments at 18; NAAG Comments at 6.

20 *See* 47 C.F.R. § 64.1200(f)(3); 16 C.F.R. § 310.2(n). According to one commenter, 33 States have enacted "established business relationship" provisions that differ from federal law. *See* Venetian Casino Resort Comments at 6.

a firm to consult State do-not-call registries as a condition to making an interstate telemarketing call.[21]

II. CONGRESS' INTENTION IS CLEAR: STATES MAY NOT REGULATE INTERSTATE TELEMARKETING WITH STATE TELEMARKETING LAWS

All commenters agree that the central inquiry in considering the subject of preemption is the intent of Congress in enacting the Telephone Consumer Protection Act ("TCPA") – specifically, whether Congress intended to permit States to apply their own telemarketing laws to interstate telemarketing calls.[22] States assert, however, that Congress in the TCPA had "no 'clear and manifest' purpose to preempt state laws."[23] Consumer groups similarly assert there is "no evidence" of any Congressional intent to prohibit state telemarketing laws as applied to interstate telemarketing.[24] These assertions, however, cannot be squared with the language and structure of the TCPA:[25]

- Congress enacted the TCPA precisely because States lacked authority to regulate interstate telemarketing.[26]

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[21] A FCC preemption order would have the effect of encouraging States to download their State do-not-call registries onto the national registry, consistent with the Congressional intent that "a single national database" be established. 47 U.S.C. § 227(c)(3).

[22] *See, e.g.*, New Jersey AG Comments at 4 ("The intent of Congress is generally the primary factor in determining whether State law is preempted."); Tennessee Regulatory Authority ("TRA") Comments at 10 (Congress "must make its intention to [preempt] 'unmistakably clear in the language of the statute.'"); Electronic Privacy Information Center *et al.* ("EPIC") Comments at 7 ('Congressional intent is the critical factor in preemption analysis.").

[23] Indiana AG Comments at 15.

[24] EPIC Comments at 5.

[25] In discerning Congressional intent, the FCC, like the courts, "must first exhaust the traditional tools of construction to determine whether Congress has spoke to the precise question at issue. The traditional tools include examination of the statute's text, legislative history, and structure." *Bell Atlantic* v. *FCC*, 131 F.3d 1044, 1047 (D.C. Cir. 1997). *See also California Metro Mobile* v. *FCC*, 365 F.3d 38, 44 (D.C. Cir. 2004).

[26] *See, e.g.*, Congressional Statement of Findings, PUB. L. NO. 102-243, § 2(7)("Over half the States now have statutes restricting various uses of the telephone for marketing, *but telemar-*

- In the TCPA, Congress expanded FCC authority to include intrastate telemarketing in addition to interstate telemarketing, and it further empowered the FCC to "design different rules," a task requiring a "balancing" of competing interests.[27] The FCC cannot discharge this statutory objective if States can "trump" FCC decisions by applying more restrictive rules to interstate telemarketing.
- Congress expressly preserved State authority to adopt more restrictive rules with respect to *intrastate* telemarketing.[28] This savings clause would have been unnecessary had Congress also given States the authority to adopt more restrictive rules as applied to *interstate* telemarketing as well.[29]
- Congress empowered States to *enforce* federal law as applied to interstate telemarketing.[30] This enforcement authority would have been unnecessary if States could apply their own telemarketing laws to interstate telemarketing.
- Congress gave consumers a private right of action to sue in State court interstate telemarketers who violate FCC rules.[31] Again, this special remedy would have been unnecessary if States could apply their own telemarketing laws to interstate telemarketing.

Congress' intent to preempt State regulation of interstate telemarketing is further buttressed by the TCPA's legislative history, including:

- The Senate Report accompanying the TCPA stated that "Federal action is necessary because States do not have jurisdiction to protect their citizens against those who . . . place interstate telephone calls."[32]

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keters can evade their prohibitions through interstate operations; therefore, Federal law is needed to control residential telemarketing practices.")(emphasis added). The suggestion that States, but not the FCC, possessed regulatory authority over interstate telemarketing prior to the enactment of the TCPA (*see* Indiana AG Comments at 7-13; New Jersey AG Comments at 5-6; TRA Comments at 3-4; EPIC Comments at 4-6) is thus baseless.

27 *See* Congressional Statement of Findings at §§ 2(9) and (13). *See also id.* at § 2(15)(FCC empowered to adopt rules pertaining to calls to businesses.

28 *See* 47 U.S.C. § 227(e)(1)("[N]othing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive *intrastate* requirements.")(emphasis added).

29 The argument that this savings clause includes State authority over interstate telemarketing (*see* Indiana AG Comments at 15-16; New Jersey Comments at 6-7) is flawed, as Sprint has previously documented. *See* Sprint Opposition at 8-12 (July 15, 2005).

30 *See* 47 U.S.C. § 227(f)(1).

31 *See* 47 U.S.C. § 226(c)(5).

32 S. REP. NO. 102-178, at 5 (Oct. 8, 1991).

- The House Report accompanying the TCPA stated that "federal legislation is needed to . . . protect legitimate telemarketers from having to meet multiple legal standards."[33]
- The Chairman of the Senate Commerce Committee and one of the co-sponsors of the bill in the Senate stated that "State law does not, and cannot, regulate interstate calls,"[34] and that "[p]ursuant to the general preemptive effect of the Communications Act of 1934, State regulation of interstate communications, including interstate communications initiated for telemarketing purposes, is preempted."[35]
- One of the co-sponsors of the bill in the House, and a ranking member of the House Telecommunications Subcommittee, stated that to "ensure a uniform approach to this nationwide problem H.R. 1304 would preempt inconsistent State law. From the industry's perspective, preemption has the important benefit of ensuring that telemarketers are not subject to two layers of regulation."[36]
- Another co-sponsor of the bill in the House stated that the legislation, which "covers both intrastate and interstate unsolicited calls, will establish Federal guidelines that will fill the regulatory gap due to difference in Federal and State telemarketing regulations. This will give advertisers a single set of ground rules and prevent them from falling through the cracks between Federal and State statutes."[37]

The States' and consumer groups' response is either to ignore this history,[38] or to claim these Congressional observations "were incorrect when they were made" and that the FCC is "misinformed" by relying on this history.[39] In other words, the States would have the Commission believe that the legislators who drafted and approved the TCPA did not understand what they were doing.

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33 H.R. REP. NO. 102-317 at 10 (Nov. 15, 1991). EPIC's assertion that "Congress demonstrated no intent to establish uniform standards" (Comments at 8) is factually inaccurate.

34 137 Cong. Rec. S18781, 18784 (daily ed. Nov. 7, 1991)(remarks of Sen. Hollings).

35 137 Cong. Rec. S16205 (daily ed. Nov. 27, 1991)(remarks of Sen. Hollings).

36 137 Cong. Rec. H10339, 10342 (Nov. 18, 1991)(remarks of Rep. Rinaldo).

37 137 Cong. Rec. H793 (daily ed. March 6, 1991)(remarkets of Rep. Markey).

38 *See, e.g.*, Electronic Privacy Information Center *et al.* ("EPIC") Comments at 5 ("There is no evidence of congressional intent to prohibit state laws regulating [interstate] telemarketing.").

39 New Jersey AG Comments at 7; Indiana AG Comments at 6-7.

Some States and consumer groups also place great reliance on the fact that the Senate, in concurrently considering a different bill (the Telephone Advertising Consumer Rights Act), did not adopt a provision that would have explicitly preempted States over interstate telemarketing.[40] However, the relevant legislative history that Sprint Nextel summarizes in Attachment A confirms that the Senate did not adopt this provision simply because it deemed the amendment unnecessary, as the Senate and the House were already in agreement that States lack regulatory authority over interstate telemarketing.

Congressional intent is the touchstone of any preemption analysis, as state and consumer groups recognize.[41] Here, the Congressional intent to preempt State law as applied to interstate telemarketing is overwhelming and unmistakably clear.[42]

III. THE ADDITIONAL STATE AND CONSUMER GROUP ARGUMENTS SHOULD BE REJECTED

States and consumer groups offer numerous additional reasons why the Commission should permit States to apply their more restrictive telemarketing laws to interstate telemarketing.[43] These additional arguments are not legally relevant. As the Supreme Court has held, "If

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[40] *See* North Dakota AG Comments at 6-7; Indiana AG Comments at 17-18; AARP Comments at 5-6.

[41] *See Medtronic* v. *Lohr*, 518 U.S. 470, 485-86 (1996)("The purpose of Congress is the ultimate touchstone in every pre-emption case. As a result, any understanding of the scope of a pre-emption statute must rest primarily on a fair understanding of congressional purpose. Congress' intent, of course, primarily is discerned from the language of the pre-emption statute and the statutory framework surrounding it. Also relevant, however, is the structure and purpose of the statute as a whole, as revealed not only in the text, but through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law.").

[42] Accordingly, North Dakota's reliance on *Head* v. *New Mexico Board of Examiners*, 374 U.S. 424, 432 (1963), is inapposite because in that case, there was no "positive evidence of legislative intent" regarding preemption. *See* North Dakota Comments at 2.

[43] *See, e.g.*, AARP Comments at 7 (State regulation is "beneficial, not burdensome"); TRA Comments at 18 (State regulation is "more economical"); Indiana AG Comments at 2 ("Indi-

the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[44] As noted, Congress's intent to preempt state telemarketing laws as applied to interstate telemarketing is clear, and thus the Commission must confirm preemption of state interstate telemarketing regulations. Notwithstanding, for the record many of these additional arguments lack merit, as discussed below.

A. Argument: The TCPA does not apply to the receipt of interstate telemarketing calls. The MPSC contends that the Commission should distinguish between "the *initiation* and the *dissemination* of a telecommunications call" and that States should be permitted to regulate interstate calls to the extent they are "received" in their respective State.[45] Thus, according to the MPSC, although certain speech is lawful under federal law, a State could make that speech unlawful if persons within their State hear the speech. The MPSC's suggestion that more restrictive State regulation of interstate telemarketing would not create a conflict with federal law is not

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ana's citizens insist on more privacy" than federal law); *id.* at 4 (Preemption would be "bad public policy").

44 *Chevron* v. *Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984).

45 *See* Michigan Public Service Commission ("MPSC") Comments at 7 (July 15, 2005) (emphasis in original). *See also id.* at 12 ("The MPSC maintains that individual states should be permitted to regulate the *dissemination of messages* within its boundaries.")(emphasis in original). None of the three cases that the MPSC cites support its position. Two of the cases involved intrastate communications only; neither court addressed the separate question whether State regulatory authority applies to interstate telemarketing calls. *See Van Bergen* v. *Minnesota*, 59 F.3d 1541, 1548 (8th Cir. 1995)(TCPA savings clause "expressly does not preempt state regulation of *intrastate* ADA calls that differs from federal regulation.")(emphasis added); *Texas* v. *American Blast Fax*, 121 F. Supp. 2d 1085 (W.D. Tex. 2000)(TCPA applies to intrastate communications). And the third case completely undermines the MPSC's position, because the court dismissed the state law claim on the ground that "the weight of authority hold[s] that state laws such as § 396-aa apply only to intrastate communications" and that the faxes at issue involved interstate communications only. *Gottlieb* v. *Carnival Corp.*, 367 F. Supp. 2d 301, 311 (E.D.N.Y. 2005).

credible.[46] The MPSC argument also fails because Congress made clear that the TCPA encompasses both the initiation and receipt of telemarketing.[47]

B. Argument: Preemption of interstate telemarketing is inconsistent with other federal laws. EPIC contends that preemption of state laws over interstate telemarketing is inconsistent with other privacy laws that Congress as enacted, such as the Employee Polygraph Protection Act, the Driver's Privacy Protection Act, and the Health Insurance Portability and Accountability Act.[48] This argument is a "red herring," however, as it is axiomatic that a preemption analysis must be conducted based on the specific statute at issue, not by reference to other laws. In any event, the statute most analogous to the TCPA is the recent CAN-SPAM Act, as telemarketing and spam each involve use of telecommunications in connection with unsolicited marketing of commercial products and services. In the CAN-SPAM Act, Congress permitted States to enforce federal law (like the TCPA),[49] but it preempted States from regulating spam in any way, *including* intrastate spam.[50]

C. Argument: Preemption is inappropriate because State laws share the same purpose as federal law. Several parties contend that the Commission should "permit" States to regulate in-

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46 *See* MPSC Comments at 7 and 12. *Compare 2003 TCPA Order,* 18 FCC Rcd 14014, 14065 ¶ 84 (2003) ("[A]ny any state regulation of interstate telemarketing calls that differs from our rules almost certainly would conflict with and frustrate the federal scheme and almost certainly would be preempted.").

47 *See, e.g.*, 47 U.S.C. § 227(c)(1)(FCC shall adopt rules concerning "the need to protect residential telephone subscribers' privacy rights to avoid *receiving* telephone solicitations to which they object.")(emphasis added); *id.* at § 227(b)(2)(A)(FCC shall consider adopting rules so businesses can "avoid *receiving* calls made using an artificial or prerecorded voice.")(emphasis added). *Compare* 47 U.S.C. § 153(22)("The term 'interstate communication' . . . means communication or transmission (A) from any State . . . to any other State . . . .").

48 *See* EPIC Comments at 16-17.

49 *See* 15 U.S.C. § 7706(f).

50 *See id.* § 7707(b).

terstate telemarketing "[b]ecause both state and federal governments share the goal of deterring 'the nuisance and invasion of privacy.'"[51] But the Supreme Court has held that in these circumstances as well, State law is preempted "if it interferes with the methods by which the federal statute was designed to reach [its] goal."[52]

> [I]t is not enough to say that the ultimate goal of both federal and state law is to eliminate water pollution. A state law also is preempted if it interferes with the methods by which the federal statute was designed to reach this goal. In this case, the application of Vermont law would allow respondents to circumvent the [federal] permit system, thereby upsetting the balance of public and private interests so carefully addressed by the Act.[53]

So too here, Congress in the TCPA sought to balance consumer interests in privacy with "legitimate telemarketing practices."[54] Among other things, Congress sought to ensure that, at least with regard to interstate telemarketing, "legitimate telemarketers [should be protected] from having to meet multiple legal standards."[55] State regulation of interstate telemarketing obviously would frustrate and undermine the Congressional decision that interstate telemarketers should be subject to one set of rules – specifically, federal rules.[56]

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51 MPSC Comments at 12. *See also* EPIC Comments at 6 and 10; TRA Comments at 4.

52 *Gade* v. *National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 103 (1992). The Court in *Gade* rejected the argument that 'the OSH Act does not pre-empt nonconflicting state laws because those laws, like the Act, are designed to promote worker safety." *Id.* at 103.

53 *International Paper* v. *Ouellette*, 479 U.S. 481, 494 (1987).

54 Congressional Statement of Findings, PUB. L. NO. 102-243, § 2(9).

55 H.R. Rep. No. 102-317, at 10 (1991).

56 In addition, the FCC may not, as certain commenters assume, subdelegate its authority to States, particularly where, as here, Congress made clear that States should not have such authority. *See USTA* v. *FCC*, 359 F.3d 554, 565-66 (D.C. Cir.), *cert. denied*, 125 S. Ct. 345 (2004) ("[S]ubdelegations to outside parties are assumed to be improper absent an affirmative showing of congressional authorization. . . . A general delegation of decision-making authority to a federal administrative agency does *not*, in the ordinary course of things, include the power to subdelegate that authority beyond federal subordinates.")(emphasis in original).

IV. CONCLUSION

Congress made manifestly clear that States lack the authority to regulate interstate telemarketing – although they may enforce federal law against interstate telemarketers. For the foregoing reasons, Sprint Nextel Corporation respectfully requests that the Commission grant the declaratory ruling petitions filed with it in this docket, except for the Boling petition, which should be denied.

Respectfully submitted,

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Attachment A

LEGISLATIVE HISTORY OF THE TCPA

Several commenters state that "Congress rejected proposed language that would have expressly preempted state telephone privacy laws with regard to interstate telemarketing solicitations."[57] These comments then cite *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186 (1974), for the proposition that such "a pre-enactment deletion 'strongly militates against a judgment that Congress intended a result that it expressly declined to enact.'"[58] In fact, a review of the relevant legislative history confirms that Congress intended to preempt State regulation of interstate telemarketing and that the Senate did not adopt the referenced language because it deemed the provision unnecessary.

The Telephone Consumer Protection Act ("TCPA") was based on Senate Bill 1462 and signed into law December 20, 1991 after significant amendment in the Senate and compromise with the House, which enacted different legislation, H.R. 1304.[59] Senate Bill 1462, as approved by the Senate *via* voice vote on November 7, 1991, provided that:

> Nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits – (1) the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements; (2) the use of automatic telephone dialing systems to transmit prerecorded telephone solicitations; or (3) the use of artificial or prerecorded voice messages.[60]

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57 AARP Comments at 5-6.

58 Indiana AG Comments at 18, *quoting Gulf Oil*. *See also* North Dakota Comments at 5-6; AARP Comments at 5-6.

59 *See* Pub. L. No. 102-231, § 3(a), 105 Stat. 2395 (Dec. 20, 1991).

60 137 Cong. Rec. S16207 (Nov. 7, 1991).

This language is virtually identical to Section 227(e)(1) of the TCPA which, as enacted, applies also to "the making of telephone solicitations."[61]

That same day, the Senate also approved by voice vote a different bill, Senate Bill 1410, the Telephone Advertising Consumer Rights Act, which included language providing that "[t]his section preempts any provisions of State law concerning interstate communications that are inconsistent with the interstate communications provisions of this section."[62] This bill (S. 1410) also included state law savings clause language substantially similar to Senate Bill 1462.[63] Other than a brief colloquy between Senator Gore and Senator Pressler, the sponsor of Senate Bill 1410, in which Senator Gore expressed concern for States' intrastate authority, stating "it would be preferable to have the Federal law as a national scheme to protect telephone subscribers" and that as to intrastate communications, States should be "encourag[ed] to adopt laws consistent the Federal system," there was no discussion on the Senate floor concerning the preemptive scope of the bills, and there was no discussion otherwise pointing out the differences between their preemption provisions.

Separately, the House approved H.R. 1304 on November 18, 1991, by voice vote, which contained a similar savings clause also providing that "[n]othing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits (A) The use of telephone facsimile machines or other electronic devices to send unsolicited advertisements [or] (B) The use of automatic telephone dialing systems to transmit prerecorded telephone solicitations."[64]

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61 47 U.S.C. § 227(e)(1).

62 137 Cong. Rec. S16202 (Nov. 7, 1991).

63 *See id.*

64 H.R. 1304 § 3.

On November 26 and 27, 1991, the Senate and House approved the amended version of Senate Bill 1462 that was ultimately enacted into law. No conference report was released. On the Senate floor, however, Senator Hollings, then Chairman of the Senate Commerce Committee and the chief sponsor of Senate Bill 1462, explained that the final legislation "incorporate[d] the principal provisions of all three pieces of legislation."[65] While various commenters assert that the absence of Senate Bill 1410's preemption language from the enacted version indicates that Congress did not intend to preempt state regulation of interstate service in this area, Senator Hollings' statement contradicts this conclusion:

> Section 227(e)(1) clarifies that the bill is not intended to preempt State authority regarding intrastate communications except with respect to the technical standards under section 227(d) and subject to section 227(e)(2). *Pursuant to the general preemptive effect of the Communications Act of 1934, State regulation of interstate communications, including interstate communications initiated for telemarketing purposes, is preempted*."[66]

Senator Hollings' explanation confirms that Congress essentially viewed the discarded language of Senate Bill 1410 as redundant and therefore unnecessary. The House and Senate Reports accompanying their respective versions of the TCPA further confirm this interpretation.[67] For example, the Senate Report provides that "States do not have jurisdiction over interstate calls" and "States do not have jurisdiction,"[68] with the House Report specifying that "federal legislation is needed to . . . protect legitimate telemarketers from having to meet multiple

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65 137 Cong. Rec. S18783 (Nov. 27, 1991).

66 137 Cong. Rec. S18783 (emphasis added).

67 *See generally Disabled in Action of Metropolitan New* York v. *Hammons*, 202 F.3d 110, 124-26 (2d Cir. 2000)(conference committee report, committee reports, sponsor/floor manager statements are most authoritative and reliable materials of legislative history).

68 S. REP. NO. 102-178, at 3, 5 (1991).

legal standards.[69] This legislative history underscores the clear Congressional intent that States may not regulate interstate telemarketing.

Commenters would have the Commission ignore the plain language and structure of the TCPA as enacted, as well as the explanations from the TCPA's legislative history that directly address the issue at hand. Where changes are made from earlier versions of legislation without explanation, the Supreme Court has confirmed that "[t]he interpretation of statutes cannot safely be made to rest upon mute intermediate legislative maneuvers."[70] Here, however, both houses of Congress clearly intended that States lack authority to regulate interstate telemarketing.

The *Gulf Oil* case cited by a number of commenters is inapposite. This decision entailed an interpretation of the term "in commerce" in particular sections of the Clayton and Robinson-Patman Acts. The *Gulf Oil* Court posited alternative readings of Congress's intent in deleting particular wording from the final version of legislation in conference committee – "[w]hether Congress took this action because it wanted to reach only price discrimination in interstate markets or because of its then understanding of the reach of the commerce power" – but concluded that "[Congress'] action strongly militates against a judgment that Congress intended a result that it expressly declined to enact."[71] Here, in contrast, Congress squarely addressed the preemption issue in the TCPA itself, and the structure of the TCPA and relevant legislative history further confirms Sprint Nextel's reading of Section 227(e)(1).

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69 H.R. Rep. No. 102-317, at 10 (1991).

70 *Mead Corp.* v. *Tilley*, 490 U.S. 714, 723-24 (1989), *citing Trailmobile Co.* v. *Whirls*, 331 U.S. 40, 61 (1947)); *see also U.S. Ex Rel. Sinson* v. *Prudential Ins.*, 944 F.2d 1149, 1156 (3d Cir. 1991) (tenet of statutory construction that "[w]here Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended" is not inviolable where legislative history does not reveal what Congress intended).

71 *Gulf Oil,* 419 U.S. at 200.